APPELLANT PRO SE:

WILLIAM EARL ROSS
Pendleton, Indiana

ATTORNEY FOR APPELLEE:

STEPHEN M. GENTRY
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM EARL ROSS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0601-CV-13
	)	
JAN B. BERG,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0304-PL-740

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

William Earl Ross appeals the trial court's entry of summary judgment in his action for fraud and deceit against Jan B. Berg, the attorney who represented him in the direct appeal of his criminal convictions. He raises several issues, of which we find one dispositive: whether the trial court erred in granting Berg's motion for summary judgment and denying Ross's motion for summary judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

The Marion County Public Defender Agency appointed Berg to represent Ross in the direct appeal of his criminal convictions. In her representation of Ross, Berg discussed potential issues for appeal with him, both on the telephone and through written correspondence. During these discussions, Ross told Berg about an issue involving prosecutorial misconduct that he wanted to be raised in his appeal. Berg did not believe it to be a viable claim and advised Ross that she would not be raising it in the appellate brief. When Berg did not include the issue in the brief, Ross complained, and in a letter dated June 4, 2002, Berg advised him that, if he felt it was necessary to raise the claim, he could attempt to raise it on his own through a *pro se* amendment to the appellate brief. *See Appellant's App*. at 52. Berg told Ross that the Court of Appeals had the discretion as to whether they would address the *pro se* amendment. *Id*. Thereafter, Ross filed a *pro se* amendment, and the Court of Appeals rejected it, stating that the Indiana Supreme Court "has repeatedly refused to recognize a constitutional right to hybrid representation which is the right to proceed *pro se* and to be represented by counsel at the same time." *Id*. at 54. Noting that Ross was represented by counsel, the Court of Appeals then denied his petition to file an

oversized and amended appellate brief. *Id*. The appeal continued, but was ultimately unsuccessful.

On April 24, 2003, Ross commenced a civil action against Berg for fraud and deceit. Ross based his complaint on the June 4, 2002 letter from Berg informing Ross that he could attempt to file a *pro se* amendment to the appellate brief if he chose. Ross filed a motion for appointment of counsel as an indigent on July 9, 2004. A hearing was held on this motion, and the trial court denied it pursuant to IC 34-10-1-2(d). Berg filed a motion for summary judgment and designated evidence on April 20, 2005. Ross did not file a response to Berg's motion or designate any evidence in opposition. However, on July 29, 2005, he filed his own motion for summary judgment and designated evidence. After a hearing, the trial court granted Berg's motion for summary judgment and denied Ross's motion on October 24, 2005. Ross now appeals.

DISCUSSION AND DECISION

Our standard of review for a grant or denial of summary judgment is the same as that used in the trial court: summary judgment is only appropriate when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Jacobs v. Hilliard*, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005), *trans. denied*. The burden is on the moving party to designate sufficient evidence to eliminate any genuine issues of material fact, and when this requirement is fulfilled, the burden shifts to the nonmoving party to come forth with contrary evidence. *Jacobs*, 829 N.E.2d at 632. We construe all facts and reasonable inferences to be drawn from those facts in favor of the nonmoving party. *Id*.

In his complaint, Ross alleged that Berg had committed fraud and deceit in her representation of him on appeal when she advised him of two cases that she believed supported her decision not to raise the prosecutorial misconduct issue on appeal and that he could attempt to file a *pro se* amendment to the appellate brief to raise the claim. The elements of fraud are: (1) a material misrepresentation of past or existing fact by the party to be charged, which; (2) was false; (3) was made with knowledge or in reckless ignorance of the falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party injury. *Precision Homes of Ind., Inc. v. Pickford*, 844 N.E.2d 126, 131 (Ind. Ct. App. 2006), *trans. denied*. The essential elements of deceit are: (1) a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; (2) it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and (3) the party did in fact rely upon it and was induced thereby to act to his or her injury or damage. *Shepherd v. Truex*, 823 N.E.2d 320, 327-28 (Ind. Ct. App. 2005).

Ross argues that the trial court erred when it granted summary judgment in favor of Berg and when it denied his motion for summary judgment. Specifically, he contends that the trial court should not have granted Berg's motion for summary judgment because Berg's designated evidence did not establish that she was entitled to judgment as a matter of law. He also claims that he was entitled to judgment as a matter of law because his designated evidence showed that Berg committed fraud and deceit in her communications with him regarding his appeal and no genuine issues of material fact remained on this issue.

Berg's designated evidence showed that during her representation of Ross on his appeal, he wanted an issue of prosecutorial misconduct raised in his appellate brief, and Berg did not believe that it was a viable issue. In a letter to Ross, Berg included two cases that she believed supported her reasoning as to why the prosecutorial misconduct was not worth pursuing. Additionally, Berg told Ross that she would not be raising the issue in the brief, but advised him that if he believed that it was imperative to raise it, he could send a *pro se* amendment to be considered with the brief to the Court of Appeals. *Appellant's App*. at 52. She advised him that the Court of Appeals had discretion in whether or not they would consider his amendment. *Id*. We conclude that even if Berg's statements in her letter to Ross were misrepresentations, they were not misrepresentations of fact. Berg's statements merely contained her interpretation of law. Both fraud and deceit require a misrepresentation of fact; "'expressions of opinion are not actionable.'" *Darst v. Ill. Farmers Ins. Co.*, 716 N.E.2d 579, 581 (Ind. Ct. App. 1999), *trans. denied*. Therefore, the trial court did not err when it granted summary judgment in favor of Berg and denied Ross's motion for summary judgment.[1]

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.

[1] One of the other issues that Ross raised in his brief was that the trial court abused its discretion when it denied Ross's motion for appointment of counsel. To the extent that our decision does not dispose of this issue, we conclude that because of the above discussion, Ross's fraud and deceit claim was not likely to prevail on the merits, and the trial court did not abuse its discretion when it denied his motion to appoint counsel. *See* IC 34-10-1-2(d)(2).